

Kolevi: Bulgaria's 10-Year Cat-and-Mouse Game with the Council of Europe and the Venice Commission

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According to the [Collins Dictionary](#), in a game of cat and mouse, one person “tries to confuse or deceive the second in order to defeat them”. Indeed, a cat-and-mouse game perfectly describes Bulgaria's stubborn refusal to comply with [Kolevi v Bulgaria](#), which requires a reform of Bulgaria's Prosecutor's Office, and it has been going on for a decade. Bulgaria's government, in the role of the mouse, has tried diverse maneuvers ranging from playing deaf to overt deception. It was caught by the Council of Europe and the Venice Commission, which gave a superb performance as the cats, every single time. Yet, the latest trick pulled out of the bag is quite original – Bulgaria's government essentially asked Bulgaria's Constitutional Court to clarify if some of the concerns raised by the Venice Commission were reasonable, and this court deemed the [question admissible](#) on 28 January 2020.

Bulgaria's Constitutional Court managed to cause a stir in 2018 when it declared that the *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, known as the Istanbul Convention, was anti-constitutional based on legal reasoning, which [I argued](#) was suspect and which, subsequently, was criticized by the [UN Special Rapporteur](#) on violence against women. In other words, anything can be expected, so the cats as well as those interested in the rule of law should not lose focus.

Kolevi v Bulgaria – the Scary Diagnosis of Bulgaria's Rule of Law

This [decision](#) by the European Court of Human Rights (ECtHR) served as a wake-up call that Bulgaria's rule of law was seriously sick and needed a cure. The facts of the case are not for those who dislike thrillers, but they are necessary to understand the scale of the problem which the case revealed (paras 6-116).

In a nutshell, a high-ranking prosecutor (Prosecutor Kolev) suspected that Bulgaria's General Prosecutor Filchev was mentally ill and was abusing his office by opening bogus criminal proceedings. After raising a voice, he expected that he would be framed for drug possession and informed the Ministry of Interior and the Supreme Judicial Council, which appoints and promotes all magistrates and monitors their ethical values. They took no action. Shortly after, Kolev was indeed framed and kept in custody for an excessive period. Meanwhile, the abuse transferred onto his family members who were framed and charged by the Prosecutor's Office too. Eventually, Prosecutor Kolev was released by the Supreme Court of Cassation, which held that

his detention was inadmissible. He started his own investigation into the alleged illegal activities of General Prosecutor Filchev. This is when Kolev started fearing for his life and warned Bulgarian institutions that he could be murdered any moment. A year later, he was murdered in front of his own home; one of his colleagues working on the investigation into the dealings of the General Prosecutor was murdered a few days later. Years later, the ECtHR held that Bulgaria had breached Prosecutor Kolev's right to liberty (Article 5 of the ECHR) and right to life (Article 2) because of the inefficient investigation into his murder.

In the decision itself, the ECtHR highlights that the centralized structure of Bulgaria's Prosecutor's Office makes it impossible to carry out an investigation into facts implicating the General Prosecutor because the prosecution has a monopoly on the investigation process (see paras 205 and 209).

The Tricks of the Mouse

Since *Kolevi* was handed down, the Council of Europe has reminded Bulgaria twice per year to comply with it (for the latest reminder, see Interim Resolution CM/ResDH(2019)367). The key requirements include: 1) a fresh inquiry into the murder of Prosecutor Kolev, including an investigation into Filchev's alleged implication; 2) a reform which ensures an independent investigation into circumstances implicating the General Prosecutor. It is also helpful to mention that Bulgaria's Prosecutor's Office was [modeled](#) after the Soviet one – it has an entirely vertical structure with no checks and balances where all decisions depend on one person (the General Prosecutor) who bears no liability for his actions and omissions. This model was introduced to Bulgaria in 1947 and the Prosecutor's Office has not faced substantive reforms since then. In [the words](#) of a former General Prosecutor, only God is above the General Prosecutor. The [Venice Commission](#) has alluded to a comparison with a monarch who neither bears political nor legal liability.

Bulgaria's ingenuity and legal creativity to avoid tackling these issues is unrivalled. After playing deaf for two years, Boyko Borissov's government set eyes on the first vehicle of deceit – the [Cooperation and Verification Mechanism \(CVM\)](#) under which the European Commission allegedly monitored the country's progress in the areas of rule of law and corruption. The [2012 CVM report on Bulgaria](#) peculiarly recommends that the General Prosecutor, who was supposed to be elected the following year, reforms the prosecution in structure and organization himself, albeit with the help of experts (at page 20). How and why the European Commission decided that it was a good idea for a person with excessive powers to reform his own powers is a mystery, possibly linked to [the reasons](#) why the CVM failed. In subsequent CVM reports, such as the one [from 2016](#), the European Commission has even praised the Prosecutor's Office for extending its own powers by creating a new unit (at page 9). What is the most important aspect here is that it seems, from the perspective of time, that Bulgaria's government simply wanted to buy an indulgence from the European Commission, which it could then show to the Council of Europe to cure the *Kolevi* headache once and for all.

As the Council of Europe, unlike the European Commission, [did not buy the tricks](#) of Bulgaria's government, the headache persisted and creativity reached new heights. In 2019, all of a sudden, Bulgaria's government invented the story that both *Kolevi* and the CVM required a mechanism for the independent investigation of what it termed "the three great ones" – the Presidents of the two Supreme Courts and the General Prosecutor. It was quickly [noted](#) that Bulgaria's government was trying to kill [several birds](#) with one stone – deceive both the European Commission and the Council of Europe that it complied with *Kolevi*, create one more pathway for the harassment of the Presidents of the Supreme Courts, and put forward one more argument why the CVM had to be terminated. The President of the Supreme Court of Cassation Lozan Panov, in fact, has been complaining about [abuse](#) for refusing to comply with political orders since his appointment.

Cats Love Hunting Mice

At a round table in June 2019 [entitled](#) "Nine years after the Strasbourg Court's *Kolevi* judgment, still no progress with guaranteeing independence of investigations against the Chief Prosecutor in Bulgaria", the Council of Europe did not sugar-coat the truth for Bulgaria's government. It also reminded it that in its [Opinion No. 855 / 2016](#), the Venice Commission concluded that the General Prosecutor was "immune from criminal prosecution". Instead of taking adequate measures, Bulgaria's government, in the face of justice minister Danail Kirilov, had another innovative idea to postpone compliance – why [don't we ask](#) the Venice Commission about the proposal to investigate "the three great ones"?

Just like cats love catching mice, the Venice Commission caught Bulgaria's lies. In [Opinion No. 968 / 2019](#) of 9 December 2019, the Venice Commission stressed that in the current system the General Prosecutor may "effectively hinder any investigation directed against him/her" (para 18). It also raised concerns that Kirilov's proposal "risk[ed] not to solve the problem of de facto impunity of the [General Prosecutor] identified by the ECtHR in the *Kolevi* judgment" (para 34). It also highlighted that "... in the context of criminal investigations it is wrong to put the [General Prosecutor] and the two chief judges on the same footing...the [General Prosecutor] represents a more serious danger for the independence of any investigation..." (para 41).

The Venice Commission also alluded that there may be a necessity for a constitutional amendment considering that Article 126 (2) of Bulgaria's Constitution proclaimed that the General Prosecutor exercised supervision of the legality of the work of all prosecutors (a reading entertained by many Bulgarian constitutional lawyers, too). It is in this context that in December 2019, Bulgaria's government reached out to the Constitutional Court with a question, which can be summed up as follows: Is it true that the Constitution prevents an investigation into circumstances implicating the General Prosecutor?

One can only make conjectures about what the future decision by the Constitutional Court will hold. At this stage, one can safely suspect that the government is plotting yet again. An answer in the negative, depending on how it is worded, may be used

to contradict the conclusions by the Venice Commission (look, there is no problem here). An answer in the affirmative may be used as an excuse for a superficial constitutional reform which will be used as a cover for the real issue – the vertical structure and the dependencies created because of it in the past decades.

In its latest Opinion, the Venice Commission itself has stressed that the problem identified in *Kolevi* cannot be “solved by one single amendment but will rather require a combination of institutional changes, new procedural and substantive rules, and the evolution of professional ethos and political culture” (para 70). In other words, this is a long journey which Bulgaria has avoided undertaking.

While the Cat’s Away, the Mice Will Play

Those who are not acquainted with the Bulgarian context may be tempted to say that the facts of *Kolevi* are extreme and, while important, the possibility of investigating the General Prosecutor is not a fundamental guarantee for the rule of law in the country. Sadly, however, Bulgaria’s Prosecutor’s Office is permanently shaken by scandals which disprove this argument and raise the eyebrows of rule of law experts. The name of Sotir Tsatsarov, who served as General Prosecutor between 2013 and 2019, was implicated in a number of controversies. Examples include 1) [“You chose him” Gate](#): leaked wiretaps of conversations with Boyko Borissov where it is mentioned that Tsatsarov was the personal appointment of Borissov, which is problematic considering the Prosecutor’s Office is part of the justice system, not the executive; 2) [Yaneva Gate](#): leaked wiretaps of conversations between two senior judges in which it is mentioned that Tsatsarov and Borissov ordered them how to decide cases; 3) [Tzum Gate](#): allegations that Tsatsarov threatened a businessman to be careful about his political views. It is worth mentioning that this is the same General Prosecutor who the European Commission expected to reform the Prosecutor’s Office, as explained above.

Because of the untouchable status of the General Prosecutor, however, the factual circumstances of these scandals have not been investigated. There is also no hope they will be investigated in the future because the General Prosecutor traditionally blesses his heir through the Supreme Judicial Council (SJC) where he holds [a disproportionate influence](#), controls the majority of the prosecutorial college because they are his direct subordinates, and coordinates his policies with the so-called political quota in the SJC. This recurrent scenario was seen in the [latest appointment](#) of General Prosecutor Ivan Geshev, too.

However, if the allegations about Tsatsarov are true, this not only means that there is no separation of powers, no judicial independence, and no rule of law, but also confirms there is rampant corruption at the highest ranks of government. In turn, these scandals may explain why the government and the Prosecutor’s Office alike are so reluctant to comply with *Kolevi*. As [previously argued](#), the European Commission turned the CVM into an exercise in flattery by turning a blind eye to blatant threats to the rule of law and recognizing questionable or pseudo reforms aimed at maintaining the *status quo* as progress. Hence, the Council of Europe and

the Venice Commission are the last rays of hope that the mouse's play is being monitored. The question, which remains wide open, is who can end it.

